

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. MICHAEL J. McSHANE, JUDGE PRESIDING

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5
6 JEFF BOARDMAN, et al.,)

7 Plaintiffs,)

8 v.)

No. 1:15-cv-00108-MC

9 PACIFIC SEAFOOD GROUP, et al.,)

10 Defendants.)

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12
13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 EUGENE, OREGON

15 MONDAY, AUGUST 28, 2017

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PROCEEDINGS

MONDAY, AUGUST 28, 2017

THE COURT: Okay. Why don't we have Ms. Pew call the case. We are on the record.

THE CLERK: Now is the time set for Civil Case 15-00108, Boardman, et al. versus Pacific Seafood Group, et al., oral argument on motions to compel.

THE COURT: Okay. Well, why don't we try to take things up in some order. And why don't we start with the motion to compel overdue production of documents.

My understanding is the Request 15 and 16 have been resolved; is that correct? Let me check with defense on that.

MR. SNIDER: Your Honor, you did order those produced on the last motion to compel.

We don't have any documents, which is the reason for this motion to compel.

THE COURT: With Request 15 and 16, those haven't been turned over?

MR. HAGLUND: This is Mike Haglund.

MR. SNIDER: That's right.

MR. HAGLUND: This is Mike Haglund, Your Honor.

We have not produced all of those documents, as some of the appointments we had to -- we don't believe that there are very many documents, but our fishermen clients

1 don't know how to properly or completely access their
2 computers, and we have had some difficulty with vacations
3 and forest fires getting -- some appointments had to be
4 canceled.

5 We now have those scheduled for Thursday, Friday,
6 and next Wednesday.

7 So we'll have those all assembled by the end of
8 next week and produced.

9 The other request that was outstanding, No. 24,
10 those documents were produced today.

11 THE COURT: Today?

12 MR. HAGLUND: Yes.

13 THE COURT: Okay. So I maybe misunderstood.

14 So 15 and 16 will be produced by the end of next
15 week. If they are not, I mean, we are getting to the point
16 where I have already ordered it once, so it has to be done
17 by the end of next week.

18 Now, 19 to 24 are specific documents, you know,
19 having to do with -- those are the documents dealing with,
20 you know, potential third-party buyers of Ocean Gold. And I
21 guess I am not clear.

22 Mr. Haglund, are you claiming that those are
23 privileged or that you don't have them?

24 MR. HAGLUND: I believe 19 to 24 were -- included
25 those that -- well, 19 to 24, we have -- there were multiple

1 categories where we originally said that responsive
2 documents, if any, will be produced at a mutually convenient
3 time and place.

4 Then when we had actually worked with our clients
5 to determine whether there were any documents in those
6 categories, there were none. And so we -- it was
7 subsequently pointed out to me that as to No. 24, our firm
8 would have some materials that -- that were similar to what
9 was produced by the third parties pursuant to subpoenas.
10 And we have now produced those documents that are not
11 privileged that our law firm had in its system.

12 But as to 19 through 23, those are categories of
13 requests -- none of the plaintiffs have done business with
14 Ocean Gold, so it should not be a surprise that they don't
15 have any documents that pertain to Ocean Gold.

16 THE COURT: Okay. From the defense.

17 MR. SNIDER: Yeah. Your Honor, I am just terribly
18 frustrated with this process because we file motions to
19 compel and fight over these things. Then we are told after
20 winning motions to compel that there are in fact no
21 responsive documents. So we waste our time going after
22 them.

23 Then we get third party productions revealing that
24 there apparently are responsive documents, which we receive
25 over the noon hour on today's hearing date.

1 And I just don't have a lot of confidence -- I
2 mean, I just don't have a lot of confidence that we are
3 getting responsive documents to our requests. These were
4 promised back in June. They were promised again on
5 August 21st. It's August 28th.

6 You know, we are not getting the most basic
7 documents that you have both ordered and that they haven't
8 objected to being produced.

9 And I don't know what to do at this point other
10 than we keep filing motions to compel and keep hearing that
11 they are coming.

12 THE COURT: Okay. Well, I mean, does it --

13 MR. HAGLUND: Your Honor, that's not a fair --

14 THE COURT: Let me just talk to the defense.

15 I mean, it doesn't necessarily surprise me that
16 the plaintiffs themselves would not have documents
17 regarding, you know, the interests of third parties'
18 purchase of Ocean Gold.

19 It does appear that Mr. Haglund has had some
20 discussions with folks regarding the purchase of Ocean Gold.

21 Are you satisfied that he's turned over everything
22 he has that would be considered non-privileged?

23 MR. SNIDER: Well, we actually are the ones who
24 identified for Mr. Haglund because we subpoenaed third
25 parties what they were producing when he was reaching out to

1 potential third-party buyers about the transaction.

2 But I don't know if the plaintiffs themselves
3 would have similar communications.

4 Our counterclaim is premised on an idea and a
5 theory that one of the plaintiffs, at least, had reached out
6 to Ocean Gold and articulated ulterior bases for the filing
7 of this lawsuit. Whether that would have been coupled with
8 e-mails, we don't know.

9 At some level do I have to accept Mr. Haglund, if
10 he talked to his clients, diligently searched their e-mails?
11 We don't know if that's happened. I will take Mr. Haglund's
12 word if he says he's done that.

13 But I also know that with respect to documents
14 that clearly fall within this, we are the ones who found
15 them because other people produced them, and now Mr. Haglund
16 has produced the same documents again today over the lunch
17 hour.

18 MR. HAGLUND: It's not accurate to say that they
19 are the same documents. We produced all that were -- all
20 the third-party communications that were not with clients
21 that are privileged today, and there are more documents than
22 I believe were produced pursuant to subpoenas to some third
23 parties.

24 THE COURT: Okay. Well, the best I think I can do
25 is order that the plaintiffs, again, search for any

1 documents in their possession that are responsive to
2 Requests 19 through 24 and that that also include those in
3 possession of plaintiffs' counsel.

4 And if there are documents that plaintiffs claim
5 are privileged, whether they are in possession of any
6 individual plaintiff or plaintiffs' counsel, that they be
7 sent sealed to the court for in camera review within 14
8 days.

9 So, again, my concern is there may be some
10 e-mails, some documentation where one of the plaintiffs have
11 had some kind of conversation with a third party about
12 acquisition of Ocean Gold.

13 And Mr. Haglund, I'd just like you to direct the
14 plaintiffs very carefully about what and how to search for
15 those documents, you know, having them review e-mails with
16 certain search terms that would adequately produce them and
17 within 14 days have a response.

18 If there are materials that either your firm is in
19 possession of or a plaintiff is in possession of that you
20 believe is privileged that those are to be sent sealed to
21 the court for in camera review.

22 So that is all due within 14 days.

23 MR. HAGLUND: Okay. Just so I understand, so if
24 my office had a communication with a client that pertains to
25 a purchaser for Ocean Gold, I need to submit that in camera?

1 THE COURT: Yes. I mean, I am assuming --

2 MR. HAGLUND: Okay.

3 THE COURT: -- and I guess -- you know, it's hard
4 for me to determine, without seeing something, you know,
5 what is a client being a plaintiff of in this case or
6 whether it's a third party, whether you want to call them a
7 client or just a third party of interest.

8 It's hard for me to actually understand the
9 relationships until I think I see the documents. So if you
10 do have documents that you are claiming privilege, the court
11 will review them.

12 MR. HAGLUND: Okay.

13 THE COURT: Okay. Motion to compel answers to
14 interrogatories. Let me ask --

15 MR. SNIDER: Your Honor.

16 THE COURT: Yes.

17 MR. SNIDER: Oh, I'm sorry.

18 THE COURT: Go ahead.

19 MR. SNIDER: Before we switch off the documents,
20 Mr. Haglund, in his response to the motion to compel
21 documents, indicated that he was also voluntarily producing
22 other documents. These documents were documents you
23 sustained their objection on a motion to compel.

24 We went back to Mr. Haglund and said, look, we are
25 going to move to reconsider because we have the expert basis

1 I think you were looking for on some of the requests in the
2 last motion to compel.

3 We have reached an agreement on the scope of what
4 he would produce to avoid a motion for reconsideration.

5 THE COURT: Okay.

6 MR. SNIDER: He indicated, I believe in his
7 filings, he was going to produce those small set of
8 documents by August 21st as well. That didn't happen.

9 And I'd like to tag on so we don't have to come to
10 you again that those documents we have already agreed and
11 documented between Mr. Haglund and I also be part of this
12 production due next week.

13 THE COURT: And I probably misunderstood in the
14 filings. I thought these August 21st documents were already
15 turned over and things had been resolved.

16 But Mr. Haglund, with regard to the documents that
17 you had agreed would be turned over August 21st, can we also
18 agree, then, that those be turned over within -- by the end
19 of next week?

20 MR. HAGLUND: Yes, with one clarification. We
21 agreed to produce financials and fish ticket or -- not fish
22 ticket, but settlement -- when a fisherman sells a catch to
23 a processor, there's the fish ticket that gets generated by
24 the processor that goes into the fish ticket database,
25 PacFIN.

1 THE COURT: Um-hmm.

2 MR. HAGLUND: But there's also twice a month
3 fishermen are paid by the processor with a settlement sheet
4 that shows more information regarding pricing.

5 And we have agreed to provide that. That will all
6 be assembled as well by next Friday.

7 The one thing that I assume we might get into
8 today but relates to the logbook information, and I was not
9 as knowledgeable as I am now about the concerns that the
10 states have about logbook information being provided.

11 I will be seeing that or somebody from my office
12 will be seeing that once the -- we have these -- once these
13 rescheduled appointments occur in the next week, and we may
14 have to redact some of that depending upon what concerns
15 the -- hopefully we don't have to do that, but I need to
16 address this issue with the clients.

17 THE COURT: Okay.

18 MR. HAGLUND: Specifically, to give you a little
19 more background, the problem with the PacFIN database is
20 that the states have -- especially Washington and Oregon,
21 have raised some concerns about the experts accessing the
22 logbook component of the database, which does not address
23 all fisheries. It only addresses the groundfish trawl
24 component. So it doesn't cover shrimp or crab.

25 And our expert to date has not accessed that

1 component of the PacFIN database.

2 And we understand why the states are concerned
3 about turning over access to essentially what is considered
4 to be proprietary trade secret information, i.e., because
5 this data shows exactly where a fisherman is fishing with
6 GPS info --

7 THE COURT: Um-hmm.

8 MR. HAGLUND: -- exactly where a net is let down,
9 exactly when it comes up.

10 There's an awful lot of data that they don't want
11 the states -- or they don't want accessed in this
12 litigation.

13 We are fine with that, but it's an issue that has
14 caused a delay in Pacific Seafood getting access to this
15 data.

16 And we have some concerns about it. I haven't yet
17 seen it. Hopefully we are not going to have to redact the
18 plaintiffs in any fashion, but I just wanted to alert the
19 court as to that issue.

20 THE COURT: Okay. I know we are kind of jumping
21 into the PacFIN issues, but what's the defense position on
22 this -- specifically this logbook information?

23 MR. SNIDER: Well, so -- and I agree, that's a
24 bigger issue on our motion to strike the extended case
25 schedule, and I am prepared to talk about that, but for

1 purposes of this narrow issue that we are talking about
2 right now, all we are asking for is for the plaintiffs
3 themselves to produce their own logbook data showing where
4 they fished. And that's what I thought we had reached an
5 agreement on, Mr. Haglund and I, with a few years worth of
6 that level of data.

7 I am not asking him to produce other fishermen's
8 data. That's a PacFIN issue.

9 THE COURT: Right.

10 MR. SNIDER: Has to be addressed with the
11 entities, the government.

12 So I understand -- I agree with Mr. Haglund saying
13 that this is an issue with the states. It is. But it
14 shouldn't be an issue, I don't think, with respect to our
15 request of his individual plaintiffs.

16 THE COURT: Yeah, I agree with the defense on
17 that. It doesn't make much sense to me -- you know, yes,
18 PacFIN looks at it as privileged material, and they
19 certainly have explained why in their motion to quash the
20 subpoena.

21 But that's different than the individual litigants
22 providing the information of where they fished and their
23 logbook information. It's under a protective order, so it
24 is -- I mean, I don't think they can assert a privilege in
25 the same way the state can in terms of overall PacFIN data

1 of all fishermen. But with respect to the individual
2 plaintiffs, I think that information needs to be turned
3 over.

4 MR. HAGLUND: Understood.

5 THE COURT: Okay.

6 With regard to the interrogatories, let me ask the
7 defense, we have these specific questions in Interrogatory
8 1, 2 through 4, 11, 12, and 19 regarding geographic markets.

9 Does it make more sense to first allow you to
10 depose the plaintiffs' experts? And I will -- although I
11 may have told you I don't typically allow depositions of
12 experts, if I have told you that, I will in this case.

13 But if you could depose the experts, the
14 plaintiffs have to determine whether these interrogatories
15 can actually be answered by the experts. And if they aren't
16 adequately answered by the experts, then resubmit the
17 interrogatories even though it would be past the deposition
18 deadline, or excuse me, the discovery deadline.

19 MR. SNIDER: So that's an interesting proposal,
20 and I appreciate Your Honor allowing us to take depositions
21 of experts in this case. I think that in a case like this
22 that's appropriate.

23 I would say, though, that our interrogatories --
24 maybe just to back up for a second, our interrogatories,
25 these ones that are at issue here, and I have actually

1 narrowed it down to a few less than you said given the
2 supplemental response we received earlier in August --

3 THE COURT: Okay.

4 MR. SNIDER: -- to the interrogatory responses.

5 But this kind of goes to -- I mean, you know, this
6 case is about, at least initially, what is the market and
7 who are the participants in the market and what are the
8 market shares of the participants in the market.

9 And even more fundamentally, do the plaintiffs
10 have any participation in any of this market. And that's
11 what we are trying to get at through the Interrogatory 1, 3,
12 4 and 9 is we are basically saying identify the market,
13 identify the participants, both the buyers, in this case the
14 processor, and the sellers, the fishermen. And are the
15 plaintiffs themselves participants in which market and which
16 markets are they participants in.

17 And as you can see from our briefing and the
18 answers and the portions of Dr. Radtke's report, they are,
19 in my opinion, just bobbing and weaving around identifying
20 in a straightforward way what is the market. Is it five
21 ports? Is it six ports? We have got interrogatories saying
22 five. We have got Radtke saying it's six. We have got
23 Radtke talking about the entire West Coast.

24 But then at times we have him identifying these
25 smaller port markets. And we have no indication whether the

1 plaintiffs contend they participate in these markets.

2 And what I think is going to happen is we are
3 going to get these answers and we'll realize that we have
4 been pursuing a case for two years where the remaining
5 plaintiffs, two have agreed to drop their claims, but the
6 remaining plaintiffs don't participate in any market
7 anywhere close to any market that we impacted by the Ocean
8 Gold transaction, which goes to antitrust standing, do these
9 plaintiffs have any standing to complain about this to begin
10 with.

11 And so these interrogatories are pretty basic. Do
12 we need to depose Mr. Radtke -- or Dr. Radtke to understand,
13 well, how did you arrive at that conclusion, which is the
14 response to Interrogatory No. 1, what is the relevant
15 market --

16 THE COURT: Right.

17 MR. SNIDER: -- how did you calculate market
18 share, who did you consider were market participants. Those
19 are deposition questions, and absolutely the deposition is
20 the right place to drill down on those.

21 But with the basic questions, identify the
22 markets, who the participants are in the market share, I
23 think that's appropriate on an interrogatory.

24 And I can, if you would like, point out, take you
25 through a few of these and point out what we have gotten and

1 why, in our view, it doesn't answer the question -- these
2 very straightforward questions. I am happy to do that.

3 But I think the deposition is appropriate, but I'd
4 like to start the deposition with an actual articulation of
5 what is the market, and then we can figure out how he got to
6 that conclusion.

7 THE COURT: Okay. Mr. Haglund, I would like to,
8 you know, clarify the markets before, you know, a pretrial
9 order. I mean, either you are going forward with this
10 complaint knowing what the markets are, what the geographic
11 locations are, who's involved. It just seems like we are
12 spending a huge amount of resources to figure that all out
13 after discovery and at the pretrial order. There is some
14 burden on you to identify these things as, you know, what is
15 it you are talking about in your complaint.

16 MR. HAGLUND: Right. Yes. And let me just lay
17 out a little background here, Your Honor, which I think is
18 very relevant.

19 Now, it's true that when we answered these
20 interrogatories initially that was in May. That was before
21 the deadline of June 30 that we had for our expert witness
22 disclosures, which varied somewhat from those interrogatory
23 answers, and we submitted to Pacific supplemental
24 interrogatory answers which are in the record.

25 And for example, when it comes to the -- to No. 1,

1 detailing the relevant markets, including product and
2 geographic limitations, we referred Pacific to Pages 4
3 through 12 in that expert witness disclosure.

4 And with one exception, and I have told counsel in
5 a telephone call that came in just before they replied that
6 we are willing to clarify one apparent discrepancy in that
7 eight pages of discussion.

8 But it -- otherwise, once we make that
9 clarification, it is a very precise recitation of what the
10 relevant markets are and the relationships among them in
11 the -- and part of that's covered in the balance of the 38
12 pages plus 30 some pages of appendices.

13 So there were a couple items that warrant
14 clarification, but we are -- we are in a -- we are very
15 close to, in my view, where we would be in terms of
16 Dr. Radtke's expert witness disclosure, which you don't have
17 in front of you, I don't believe --

18 THE COURT: No, I don't.

19 MR. HAGLUND: -- to the quality of and final
20 expert witness disclosure in terms of the opinions expressed
21 and the data.

22 So I think they are greatly exaggerating the issue
23 as it pertains to the interrogatories. But we are willing
24 to supplement that discrepancy that Ms. Lee identified the
25 other day.

1 There are problems, though, with their contention
2 as to No. 3. No. 3 is "Identify and detail all of the
3 market participants, including sellers and buyers, in each
4 relevant market."

5 Now, what we did is every seller is -- or every
6 buyer is any processor. And if you take the whole West
7 Coast and list all of the buyers, you are talking about, you
8 know, several hundred.

9 What we did was provide them with a list of the
10 top 20 in each of these markets.

11 Now, we can go back to PacFIN and give them a list
12 of all processors by market if the court thinks that's
13 necessary. But they are going to get access to PacFIN. We
14 haven't done that supplementing because of the -- to this
15 point because of the big issue that arose over whether they
16 are trying to -- their effort to strike our expert reports
17 on the grounds that one of our -- that the expert who
18 actually accessed the data didn't have proper access. We
19 filed today a copy. He was on vacation. I didn't get it
20 until this morning, but he did not have --

21 THE COURT: I saw it.

22 MR. HAGLUND: -- it wasn't unauthorized.

23 The other thing they have asked for is list every
24 seller. Well, every seller is every fisherman. Why should
25 we have to reproduce a list of every single fisherman that's

1 participated in these markets when they are going to have
2 that access through PacFIN?

3 THE COURT: Okay. I do think having the
4 plaintiffs detail every seller is getting unduly burdensome
5 if in fact the defendants can get access to PacFIN.

6 But in terms of defining the markets and the
7 participants and the plaintiffs' actual transactions with
8 Pacific Seafood and Ocean Gold, there needs to be more
9 detail.

10 So I am going to grant the defendants' motion to
11 compel --

12 MR. HAGLUND: Well, Your Honor, in response to
13 another interrogatory, we have provided a huge spreadsheet
14 that for an entire period through the end of 2016, and the
15 2017 data isn't in PacFIN at this point, we provided, for
16 each one of the vessels that one of the plaintiffs owns or
17 operates, a complete listing for multiple years of the date
18 of a voyage, the date -- you know, the port of delivery, the
19 purchaser for that catch and the poundage and the price.

20 So we have -- as to what our individual plaintiffs
21 were doing during the relevant period except for 2017 where
22 the PacFIN data is not available at this point because of
23 the time lag for the states getting it to the Pacific States
24 Fisheries Information Commission, we have provided all that.

25 What we can provide, if the court requires it, is

1 a list of all of the processors and their market shares for
2 2016 per PacFIN. But, again, that's available to Pacific
3 once the outstanding issues with the states are resolved.

4 MR. SNIDER: Your Honor, may I respond to a couple
5 of these things briefly?

6 THE COURT: Yes.

7 MR. SNIDER: So this notion that it's all
8 available on PacFIN, some of this data is available on
9 PacFIN.

10 What's not available is how their expert and how
11 the plaintiffs are putting people into different market
12 buckets. So, for example, Interrogatory No. 1, what are the
13 ports in the, quote, central Oregon market? List them,
14 state what they are, and then identify the processors who
15 you contend are purchasers in these three seafood markets in
16 this one geographic market.

17 You have identified six. We'd like that on each
18 one. Identify who the buyers are, what's the market share.
19 We can crunch our own numbers. We can look at that, and our
20 experts are hopefully going to be able to do that at some
21 point soon.

22 But we need to know what choices they are making.
23 And particularly, where are the plaintiffs -- what markets
24 do the plaintiffs say they are participating in?

25 And that's Rog 1, 3, and 4.

1 On Rog 9, this is the list of sales the
2 plaintiffs -- where they delivered. But the problem with
3 that response is they've identified only the delivery port.

4 We have asked for two other pieces of critical
5 information. What port did they leave from and where did
6 they fish on that fishing trip. And that's critical to this
7 60- to 100-mile radius argument. Plaintiffs say that
8 fishermen can't fish more than 60 to 100 miles from where
9 they catch or from their home port. We have seen data
10 suggesting that even the plaintiffs fish in different ports
11 than their home port.

12 But we would like to know that piece of data on
13 Rog 9. Two more pieces of information that are critical.

14 And then 17 and 18 are the ones that say dealings
15 with Pacific and Ocean Gold. So far we have seen zero
16 dealings between Pacific Seafoods and the plaintiffs because
17 we know that -- or Ocean Gold and the plaintiffs. There's
18 none.

19 So then you go why are these plaintiffs here since
20 they don't deal with us. And we'll deal with that on a
21 summary judgment motion.

22 But we need clear responses to 1, 3, 4, 9, 17, and
23 18. It's not too burdensome.

24 THE COURT: All right. Mr. Haglund, you are going
25 to have to clarify 1, 3, 4, and 9 by -- I mean, certainly

1 which species exist in each geographic market, which ports
2 are included in each market, these are -- this is your
3 complaint defining the markets. You need to be more
4 specific. And I don't think you can just say it's in our
5 expert disclosures. It's going to be found in PacFIN. I
6 think you need to be more specific.

7 So you have two weeks to submit a more detailed
8 answer to those Interrogatories 17 and 18, and your clients
9 know what kind of transactions they have had with Pacific
10 Seafood and Ocean Gold up until the present.

11 MR. HAGLUND: Well, you know, we have explained
12 that -- well, okay. Understood, Your Honor. We'll -- a lot
13 of this is just reproducing what's in the reports already
14 with some clarifications. We'll do it. No problem.

15 THE COURT: I know. You just keep saying look at
16 PacFIN. Well, you know there's a problem with the
17 defendants looking at PacFIN.

18 MR. HAGLUND: Okay. I understand.

19 THE COURT: Okay.

20 So with regards, then, to the motion to strike
21 plaintiffs' experts or extend discovery, I did review the
22 submissions that just came in from the plaintiffs, including
23 the -- I am not sure what you call it. It's some sort of
24 agreement or understanding of confidentiality that I believe
25 it was your expert Davis signed with NOAA where he or she

1 was granted access to the PacFIN data, it looks like
2 specifically for this case.

3 So I guess for the defense, my thought is I am
4 having a hard time taking the DOJ's motion to quash -- you
5 know, obviously I want to hear from them, but it's hard to
6 take that too seriously when they have allowed one side
7 access to PacFIN data.

8 It seems to me that either -- I am going to find
9 in the future that that motion to quash is not appropriate.
10 That by granting one side access to the PacFIN data, you
11 know, they have waived their ability to object to the
12 defense obtaining the same data in this case, or, I mean,
13 the other is to require the plaintiffs' experts to disclose
14 all data that they have reviewed, including PacFIN data, to
15 the defendants. I am just not sure how easy that would be
16 for the experts given the nondisclosure agreement that they
17 have entered into, whether they can physically download and
18 get you that information.

19 So I think you are going to get it ultimately. I
20 don't think the experts can testify based on data that you
21 are not -- that is not being turned over to you. I am just
22 not sure the mechanism quite yet of how we are going to get
23 it.

24 So let me hear from the defense first on that.

25 MR. SNIDER: Well, thank you, Your Honor. And,

1 you know, we also received, 30 minutes ago, this certificate
2 of understanding that we have been -- I asked for this weeks
3 ago.

4 So we are trying to understand why the states
5 aren't giving us access to things that plaintiffs' experts
6 apparently had access to.

7 And we were also told by the Washington Attorney
8 General, we provided you with the e-mail, they are saying
9 that Mr. Davis violated this authorization.

10 And so -- and then I see this document, and it
11 could be, Your Honor, this document gives him access for
12 20 -- 2009 through 2014, and we know that he went to 2005
13 through '08, and he also did '15 and '16, which this didn't
14 give him authority to do. So maybe that's what they are
15 upset about.

16 This understanding agreement also says he won't
17 identify specific vessels or processors. Well, that's the
18 entire exercise he engaged in, in part, was identifying
19 which processors were buying what from whom. So maybe they
20 are upset about that.

21 So I don't know. But what I do know, and I agree
22 with Your Honor, is Mr. Davis purportedly had unfettered
23 access to the PacFIN database. He accessed it before this
24 court authorized him to do it for 2015 and '16. His records
25 show that he accessed it in March. And he did all of this

1 without permission. And that's concerning, I think.

2 But more fundamentally, we need the same stuff. I
3 mean, under the rules, Rule 26 and Rule 37, he's got to give
4 us what he considered, and we view that as he got to do
5 whatever searches he wanted to do in the PacFIN database to
6 reach the conclusions that he and Dr. Radtke reached. And
7 thus far -- and it's very frustrating because we thought
8 when we got permission from you in early June this would be
9 a similar experience to the way it was in 2015 --

10 THE COURT: Um-hmm.

11 MR. SNIDER: -- where we would get the stuff in a
12 couple weeks, and it's turned into this -- you know, we have
13 got the State of Oregon filing motions. Everybody's upset.
14 And we are just trying to get those -- the playing field
15 leveled.

16 And I guess my point would be if Your Honor is
17 going to -- if we get the same stuff that plaintiffs had and
18 we get time for our experts, which we contemplated under the
19 schedule, like 60 days, we'd have all this stuff for 60 days
20 for our experts just like they did -- they had longer -- to
21 do our reports. If we do that, I think it's fair.

22 But if, for whatever reason, the states -- or we
23 don't get the same materials, I think you have got to strike
24 the reports or do -- I don't know what to do.

25 THE COURT: I don't know if I have a great answer

1 for you.

2 Go ahead, Mr. Haglund.

3 MR. HAGLUND: Yes. Let me just respond to a
4 couple points.

5 Number one, we believe that this document that we
6 submitted after receiving it late this morning covered
7 Mr. Davis for this entire case. The single project refers
8 to this litigation. This litigation never ended.

9 Mr. Davis has been working for all three states
10 for nearly 30 years. He is a person who always has had
11 access. He does sign these specific project reports.

12 But as a practical matter, it doesn't work to --
13 when he has overlapping projects for different governmental
14 agencies, mostly the states, it doesn't work that you
15 just -- he's already got another project authorized at the
16 point where another ends, so he's never destroying the data.

17 If it were -- I mean, we are trying to work with
18 the states, and I am encouraging them to agree to let
19 Mr. Davis simply provide to Pacific the PacFIN data that he
20 accessed. And we don't have a problem with that provided
21 they say it's okay and there's some indication that it's
22 okay provided it is done without the logbook data.

23 And I think that's an issue Your Honor is going to
24 have to -- that's not data that Mr. Davis accessed for
25 purposes of any of the compilations that he ran.

1 We did timely -- I think it was one day late. We
2 got an extra day to provide all the work papers. We did
3 provide all the work papers.

4 The database itself is not a work paper. And
5 Mr. Davis has provided -- I am not an expert in computer
6 databases, but based upon my discussions with him, the
7 database itself just rests on a computer system pursuant to
8 a download. It's not a work paper.

9 But if the states will ultimately approve him
10 downloading that to Pacific's experts, we are fine with
11 that, and we, earlier on until this controversy erupted with
12 the states, were open to doing that.

13 But we want Pacific to get the access it needs,
14 and we understand that the schedule will have to be extended
15 because of these unforeseen disruptions in the schedule.

16 THE COURT: Okay. Let's -- what if I go ahead
17 today and just order that the plaintiff turn over all PacFIN
18 data relied upon by their expert, understanding,
19 Mr. Haglund, that you might come back and just say, Judge,
20 we understand your order. We have told the state that the
21 order exists, but they are refusing him access. We can
22 certainly take up the issue at that time.

23 It may be that the defense can work out something
24 amiable with the -- with DOJ.

25 You know, did DOJ understand that the defense was

1 granted access to this data?

2 MR. HAGLUND: Yes. And I think what happened,
3 frankly, I don't know that Pacific made any effort before
4 this year to approach the Pacific States Fisheries
5 Information Commission.

6 And we -- in the prior case, Mr. Davis, just so
7 you have a little bit of background, Mr. Davis had a
8 conflict. We were not able to engage Mr. Davis in the
9 *Whaley* case.

10 And so what happened was that we got, from Judge
11 Panner, an order pursuant to the Magnuson Act authorizing
12 our experts to get access to this information, and I made a
13 call to Brad Stenberg, who heads this local -- this
14 three-state commission that's here in Portland, told him
15 what had happened, got him a copy of the order, and then he
16 said, well, are you going to want to make requests? I said
17 yes. And then he said, well, what about the other side.
18 And I said I believe that there's no doubt they will be
19 asking too. And he actually at that time asked us, well,
20 let's see if we can work out a joint approach.

21 And so what happened was, and it takes like half a
22 day to download this material, we -- John Stephens and I
23 worked out requests jointly and then the downloads were made
24 to both law firms.

25 In the next case because we had Mr. Davis, we knew

1 he could make his own approach. Pacific had new counsel by
2 that time, and he could make his own approach to -- to --
3 because he's involved in these databases all the time.

4 And so it was then -- I believe what happened is
5 that then Pacific's making its own independent request of
6 Mr. Stenberg, and for whatever reason, it raised some
7 questions that got out to the states and we are where we are
8 now.

9 We are committed to trying to find a way to
10 resolve it. We'd have no objection to you ordering us to
11 provide this, and then we'll try to be a catalyst for
12 getting the states to agree that Mr. Davis can provide it
13 to -- to Pacific's experts.

14 But given the circumstance and given the language
15 in this certificate of understanding, we need a court order
16 rather than having Mr. Davis just do it.

17 THE COURT: All right. Mr. Snider, are you
18 satisfied if we just do, at least today, a court order
19 requiring Mr. Davis to turn over all data relied upon, and
20 we'll kind of see where that goes?

21 It sounds like you are trying to work out issues
22 with DOJ, and maybe if they are aware of this and this order
23 that maybe -- maybe they are willing to withdraw their
24 motion to quash the subpoena.

25 We can certainly take up issues of privilege if we

1 have to at a hearing later with DOJ present.

2 MR. SNIDER: Yeah. So I think a federal court
3 order should mean something. And I would hope that -- I
4 agree that that's a good first step.

5 I will raise one slight issue, which is
6 Mr. Davis -- there's no steps here. There's the universe of
7 text and data, and then he made choices and downloaded
8 certain aspects of that, analyzed it, and then issued his
9 information.

10 And so what I understand, he will be able to give
11 us the post-making choices on what he was going to pull down
12 out of PacFIN and analyze. And that's important to the
13 stuff he considered and relied upon and he needs to produce
14 it.

15 We may still get in an issue with the state on --
16 on -- we'd like to start where Mr. Davis started, which is
17 what do I want to pull here? I am going to -- you know, he
18 made choices. He apparently did not do -- chose not to look
19 at the logbooks' data that is electronically collected
20 showing where people fish. He may not have. I don't know
21 everything what he did.

22 We want to see that because we think it's very
23 relevant to -- and we have collated for you to see where
24 fishermen go so you can understand their options in
25 understanding where the true markets are here.

1 So we may still have an issue, but I think that
2 that at least crosses the first step, which is get us what
3 their expert looked at.

4 And then I would say right now we have got our
5 expert reports scheduled September 21, and that was off of
6 my motion where I thought this wasn't such a big deal and we
7 would be able to get this stuff, although delayed, but more
8 quickly.

9 We are at a point where we may be filing motions
10 to compel because we have got to get Washington, California
11 in front of you too. And so we are trying to figure out the
12 best way to tee that up. So --

13 THE COURT: Okay.

14 MR. SNIDER: -- as far as our expert deadline of
15 September 21, can we -- can we strike the deadline and then
16 as soon as we get it we will give you a status report?
17 Something to highlight that we need to get the case schedule
18 adjusted. I am not sure -- I want to be mindful of that.

19 THE COURT: That makes the most sense is to strike
20 the deadlines.

21 And Mr. Haglund, maybe you can answer this because
22 I don't understand the correlation between the various
23 states and PacFIN data, but did Mr. Davis have access to
24 just Oregon fishing issues or did the PacFIN data that he
25 reviewed include California and Washington?

1 MR. HAGLUND: The latter, Your Honor.

2 THE COURT: Okay.

3 MR. HAGLUND: Once you get access to the database
4 from -- there's a time lag, '17 data isn't in it, for
5 example, yet, but you get access to all three.

6 Now, Mr. Snider has raised an issue that I have a
7 problem with, and that is he's asking, and I am not even
8 sure whether it's available or not, he's asking to get all
9 the queries that our expert made, many of which may not have
10 been germane to the opinions that our experts have
11 expressed.

12 And I don't -- given the changes in the federal
13 rules regarding expert witness disclosures, you are supposed
14 to provide the material on which you relied. The fact that
15 a particular computer query might have been made I don't
16 think is covered by that.

17 What we envision they need is they need the
18 database that he accessed. I don't believe they have a
19 right to learn every single query that he might have made.

20 THE COURT: Well, I agree. They have a right to
21 anything that he accessed on which he relied on in forming
22 his opinion.

23 At the same time I think Mr. Snider is correct in
24 that, you know, their experts shouldn't be bound by what
25 your expert thought was relevant. And their experts may --

1 MR. HAGLUND: No.

2 They are going to get the entire database. I
3 agree.

4 THE COURT: Okay.

5 MR. HAGLUND: Everything that he had access to
6 they are going to get.

7 THE COURT: But I guess there are certain things
8 that either he chose not to access or that he was not
9 allowed, like talking maybe specifically of the logbooks
10 that were mentioned earlier.

11 MR. HAGLUND: Well, I do know that he -- he has
12 had because of all these contracts and the specific
13 authorization in the document we filed today, he's had
14 access to everything, and that includes the logbooks.

15 THE COURT: Okay. All right.

16 MR. HAGLUND: And whatever -- you know, whatever
17 he had access to we are going to turn over.

18 MR. SNIDER: So Your Honor, I just wanted to
19 provide at this point -- I am sorry. Go ahead. I didn't
20 mean to interrupt.

21 THE COURT: No. Go ahead, Mr. Snider.

22 MR. SNIDER: I was just going to say that there is
23 a slight issue there. I mean, we have asked for expert work
24 papers, and under 26(a)(2)(B)(ii), you are supposed to
25 produce the factual data considered by the witness in

1 forming an opinion.

2 And if he considered a query, he ran a query and
3 decided to set it aside because he decided he didn't think
4 that was germane, he still considered it.

5 And so what I am picturing is a man sitting down
6 at a computer with access to a bunch of data downloading
7 different spreadsheets and information, choosing some to go
8 with, others not to go with, and then formulating his
9 opinions.

10 And the things he set aside I think he considered
11 and didn't go with, and that absolutely would be subject to
12 questioning as to why he chose, for example, to ignore this
13 species or this market or whatever that might show.

14 THE COURT: But you will have all that data and be
15 able to use that in deposition to ask him why he didn't
16 consider these things. And your experts are going to help
17 you formulate those questions.

18 I mean, I guess I don't understand the difference
19 between looking at what he didn't consider and asking him
20 about it versus looking at every query that he put forth in
21 bringing up data. It seems to me it's all one and the same.

22 MR. SNIDER: So I guess I see it different, Your
23 Honor. If he runs Query A and relies on it, he runs Query
24 B, he looks through it and sets it aside and runs Query C
25 and relies on it, I'd like to know he ran Query B and set it

1 aside. And if we don't know what queries he ran, we never
2 knew that. We won't know that. We will just know the ones
3 he chose. And we can point out the ones he didn't choose,
4 but I would like to point out the ones he chose and then set
5 aside. I think it's even more interesting maybe.

6 THE COURT: It might be interesting.

7 Mr. Haglund, how difficult -- I mean, I don't know
8 how many queries an expert runs in these kind of cases in a
9 database.

10 MR. HAGLUND: Well, I believe, and this is --
11 again, we are probing the limits of my computer knowledge,
12 but from what Mr. Davis has told me, this is not something
13 he can provide.

14 If you look at the rule, it's the facts or data
15 considered by the witness in forming the opinions. I mean,
16 data -- queries that you make that go nowhere weren't
17 considered in forming your opinions.

18 I just think it's -- let's take it one step at a
19 time. Let's get access to the information. Let them take
20 their depositions. Let's -- I just don't see how trying to
21 find -- I don't even know if it's available. From what I am
22 told, it's not.

23 THE COURT: Well --

24 MR. HAGLUND: He has some pages of compilations.

25 THE COURT: Well, if it's not available, it's not.

1 That may be something we can take up at depositions about
2 whether he has somehow saved these particular queries that
3 haven't really formed any opinion that he thought relevant.
4 But if they exist and they are accessible, let's -- let's at
5 least find out, Mr. Haglund, specifically. Ask Mr. Davis if
6 separate database queries are accessible to him that he can
7 turn those over. It might be helpful in depositions. So
8 let's first find out if they exist. If it's, you know,
9 unduly burdensome, it may be that it's just not
10 proportionate to the needs of the case because I am allowing
11 depositions.

12 But let's find out first, and if it's -- if it's
13 easy to access, I will expect you to turn it over. If it
14 looks like it's not accessible, you are just going to need
15 to inform the defense and we'll go from there. And it may
16 be that we'll have to --

17 MR. HAGLUND: Okay.

18 THE COURT: -- seek more information at
19 depositions about that issue.

20 MR. HAGLUND: Okay. Understood, Your Honor.

21 THE COURT: But my primary concern, Mr. Snider, is
22 that you get access to everything that their experts have
23 access to. And I am hoping we can do that through this
24 order, and we'll kind of go from there and see what else we
25 need to do.

1 MR. SNIDER: Thank you, Your Honor.

2 And we'll respond -- I think the states -- Oregon
3 filed a motion. We'll respond to that, and if we need to
4 get other motions expeditedly set up for you, we want to
5 push this case and get this data and get our experts going.

6 THE COURT: Okay.

7 MR. SNIDER: Or they are going but get them the
8 data they need.

9 THE COURT: We can set that on pretty short
10 notice, I think.

11 MR. SNIDER: Okay. Thank you, Your Honor.

12 THE CLERK: When do you want the status report?

13 THE COURT: We are going to have a status report
14 on which issue now? Help me out.

15 THE CLERK: The deadlines.

16 THE COURT: Oh. Yeah. Well, maybe in terms of
17 just setting the new deadlines, status report maybe what?
18 30 days? Or do we need more time?

19 MR. SNIDER: I think in 30 days we should have
20 motions pending and know where we are at.

21 THE COURT: Okay. All right. So status report
22 within 30 days. If we need to set, you know, expedited
23 hearings on the issues that DOJ has raised, we can do that
24 on very short order.

25 MR. SNIDER: Okay. Thank you, Your Honor.

1 THE COURT: And Mr. Snider, I am assuming you will
2 let DOJ know that this order now exists. We'll get it filed
3 quickly. The defense is required to turn this information
4 over, and if they had, I mean, seemingly unfettered access
5 to the PacFIN database, it seems to me if DOJ knows that,
6 they may rethink how they are -- their thoughts on providing
7 it to you.

8 MR. SNIDER: We have said they had unfettered
9 access and we have made these points, but I think an order,
10 and I assume this is on the record. Maybe we'll get a quick
11 transcript too and see if we can shake this loose that way.

12 THE COURT: Okay. All right. Okay. Anything
13 else we need to discuss?

14 MR. HAGLUND: Not for the plaintiffs.

15 MR. SNIDER: No, Your Honor. Thank you.

16 THE COURT: Okay. Thank you very much.

17 MR. SNIDER: Okay. Bye.

18 THE COURT: Bye-bye.

19 MR. HAGLUND: Bye.

20 *(The proceedings were concluded this*
21 *28th day of August, 2017.)*

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1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 29th day of August, 2017.

5
6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter
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